SUPREME COURT, U. S.
FILED
MAR 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN,
Executor of the Will of FREDERICK F. BREWSTER, late of Hamden, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

JOHN H. WEIR
CURTISS K. THOMPSON
Attorneys for Petitioner
205 Church Street
New Haven, Connecticut

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of FREDERICK F. BREWSTER, late of Hamden, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

The government asserts at pages 6 and 12 of its brief that Connecticut does not regard a probate decree as binding on the State's own taxing authorities. This statement is wholly wrong. The succession tax, the principal death duty in the State is always determined in and fixed by a decree of the probate court unless taken to an appellate court by the Tax Commissioner or a beneficiary or a fiduciary of the estate. *Emanuelson* v. *Sullivan*, 147 Conn. 406 cited by the government involved a probate decree fixing a tax from which an appeal was taken. The judgment of the appellate court of course controlled. In no sense does the decision deal with the conclusive effect a probate decree has upon the tax authorities. They, as well as everyone else, in the absence of fraud are bound by Section 45-9 General Statutes which appears in the appendix to our initial brief at page 13(a).

Now, the government stakes the outcome of this case upon the claim that the probate decree fixing the amount of the widow's share was non-adversary in nature. A far better rule, we submit, would be to make it turn upon whether it was an honest adjudication of the property rights of the beneficiaries. Indeed, anything less than that, we believe, would be a species of fraud sufficient to destroy the effectiveness of the decree so far as third parties are concerned. Such a rule as we shall demonstrate would have the additional virtue of conforming to earlier decisions of this court.

The decree of the Probate Court was not erroneous. Parenthetically we point out that the guardian ad litem, the Probate Judge and the District Judge, all highly capable Connecticut lawyers and experienced in its probate law, saw eye to eye on the question of Connecticut law. The panel of judges in the Court of Appeals, despite their elevated position had not had the benefit of great experience in Connecticut law.

Also the decree of the Probate Court was an honest adjudication of the property rights of the beneficiaries of the estate. The principal participants in the proceeding, the executors and their counsel, the guardian ad litem and the Probate Judge were, of course, conscious of the effect that the amount of the property passing into the widow's marital trust would have on the federal estate tax. That lesson is taught in *Jerome* v. *Jerome*, 139 Conn. 285. They were also aware that a determination of the rights of the beneficiaries under the Connecticut apportionment statute was an essential step in the settlement of the estate; and further that the only court that had jurisdiction to adjudge that matter was the Probate Court in Hamden, unless, of course, an appeal should be taken. The executors knew too that under Sec. 12–401(b) of the General Statutes, it was their express obligation to initiate a proceeding in the

Probate Court and to submit "a computation of the proposed proration." The guardian ad litem was surely aware of his obligations to the minor grandchildren and unknown remaindermen to advance claims on their behalf only when he believed them justified. The Probate Judge knew that he had to make an intelligent and honest adjudication of the property rights of the beneficiaries under Connecticut law and it is manifest from his memorandum that he did so and that he knew the financial effect of any decision he might make.

It is unfortunate that the Internal Revenue Service chose to ignore the notice of the hearing given to it.

The proceeding was truly adversary in the sense that the property interests of the widow and grandchildren were adverse and the Court weighed their merits. The executors having initiated the proceeding and made their own decision as to what Connecticut law required were, of course, under an obligation to explain their position to the Court; but having done that they were obviously not even entitled to argue for or against any beneficiary. Regardless of what the Probate Court decided, the executors we do not believe were "aggrieved" persons entitled to appeal. Doubtless the widow and the adult grandchildren were not anxious to litigate against each other and were content to accept an honest judgment by a capable judge fixing their rights.

All these things are implicit and manifest in the record here and when the government characterizes the proceeding "as an effort to avoid estate taxes," it (U. S. Brief p. 20) is wholly wrong and exceedingly unfair; it stigmatizes the guardian ad litem and the Probate Judge and it overlooks the fact that the Federal District Judge agreed with them.

Years ago this Court adopted an approach to the determination of the bnding effect of state court decrees in federal tax proceedings. In *Uterhart* v. *United States* (1916), 240 U.S. 598, in holding the judgment of a New York trial court binding on the meaning of a will, it said at page 603:

> "* * * The right to succeed to the property of the decedent depends upon and is regulated by state law. * * *, and it is obvious that a judicial construction of the will by a court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In *Freuler* v. *Helvering* (1934) 291 U.S. 35, this Court again held the decree of a California trial court adjudicating the property rights of beneficiaries respecting distribution of a trust estate was to be binding in the federal tax proceeding before it. It said, too, that the proceeding in the California court was not collusive "in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax." The Court's decision as to lack of collusion was based upon:

> "* * * The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. * * *"

Three years later this Court reaffirmed the position adopted in *Freuler* by holding, in *Blair* v. *Commissioner* (1937), 300 U.S. 5, that the decision of an Illinois trial court determining the nature and extent of the interest of

the beneficiary of a trust and his power to assign that interest was binding in the federal tax proceeding before it. That the Illinois suit was collusive was denied on the authority of *Freuler*.

Three years later this Court again made the distinction between state and federal jurisdiction very clear.

> "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. * * *"
>
> *Morgan* v. *Commissioner* (1940), 309 U.S. 78, 80.

These decisions clearly established that the decree of a state court determining property rights is conclusive in a federal tax proceeding unless that decree was obtained by collusion. Therefore, we suggest that pragmatic or policy considerations which are claimed to call for the adoption of a non-adversary rule as advocated by the government are completely irrelevant to this case. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 is likewise inapplicable as pointed out by the majority in the *Bosch* case.

In both *Freuler* and *Blair* this Court denied that there was collusion in the state court proceeding. The essential inquiry in such a case is—what collusion will vitiate the state court decree? Alternatively, the inquiry is—does the collusion which prevents a state court decree from being conclusive in a federal tax proceeding differ from the collusion which invalidates the decree of any court? In the ordinary dictionary definition "collusion" means "deceit", "fraud" or "connivance". *Webster's New International Dictionary.* Such also was this Court's view of collusion in *Dickerman* v. *Northern Trust Co.* (1900), 176 U. S. 181. At page 189, this Court said:

> "We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and

consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law,' and in similar terms by other dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one. * * *"

Only by continuing to follow the rule of *Freuler* and *Blair* that actual collusion in the legal sense is required before the state court decision can be deprived of conclusive effect can a workable rule be established. The judgment of any court can be collaterally attacked only for fraud. Thus, in the absence of collusion or fraud, the property rights of parties as determined by a state court in an in rem proceeding are forever binding between them. Uniformity of enforcement of such rights between the parties and as against outsiders is obviously desirable. We believe that this is what this Court had in mind in *Blair* when it said at page 10:

"* * * In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his

> assignees, and the decree which was entered in pursuance of the decision determined *as between these parties* the validity of the particular assignments." (Italics supplied)

See also *Darlington* v. *Commissioner* (C.A. 3), 302 F. 2d 693.

Whether a state court proceeding is adversary or non-adversary should be material only in determining whether there was actual collusion in that proceeding. If the government's use of "adversary" carries only the meaning of "having opposing or adverse interests" we cannot quarrel with it. The basic determination should be made by ascertaining whether in the state court proceeding the court had to decide between adverse property interests and its decree benefited one or more parties at the expense of the others. The Court of Appeals in *Gallagher* v. *Smith* (C.A. 3), 223 F.2d 218, expressed this position very clearly:

> "If the questions are fairly posed to the court and the tribunal is left free to decide them according to its own independent judgment it should not be necessary for the parties to take formal adversary positions and engage in legal shadow boxing in order that the judgment of the court should have conclusive effect, taxwise as well as propertywise."

A logical and practical approach along these same lines is given in Stephens and Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies* (1961), 46 Minnesota Law Review 223, 247:

> "We think a proper distillation of the variant expressions in the cases is that a state court decision of local issues germane to a federal tax controversy must be accorded full recognition by the tax tribunal if it is an adjudication of the local issues on the merits.

By this we mean that a federal judge requested to accord full recognition to a state court decision should consciously ask himself this question: Did the parties in the state proceeding invoke the function of the state judiciary in such a way that the state judge has actually gone about his usual business of interpreting state law in the light of facts fairly presented to reach and express a conclusion as to the interests and rights of the parties? If so, as the Supreme Court has said: 'To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.' The question whether the state court decision is such as to compel full recognition is a federal question."

We respectfully submit that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

CURTISS K. THOMPSON
JOHN H. WEIR
Attorneys for Petitioner